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No. 83-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.,
Petitioners,

vs.

ROSIER JENNINGS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE PETITIONERS, LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.

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QUESTIONS PRESENTED

1. Is a "disparate impact" or "effects" test appropriate to determine a violation of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and regulations promulgated thereunder?

2. In the alternative, when the Tennessee Medicaid Program provides equal hospital services to the handicapped and nonhandicapped of fourteen (14) days per year, per recipient, does such a limit constitute a "disparate impact" or prima facie violation of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and regulations promulgated thereunder, when the limit will satisfy all needed hospital care for 95% of the eligible handicapped recipients?

LIST OF PARTIES

The following parties appeared in the Court of Appeals:

Rosier Jennings b/n/f; Kathleen Jennings; Hershel Choate; Wilma Ann Hyder; Clyde Vaughn b/n/f; Edith Vaughn; Paul Ramone Parsons b/n/f; Lou Ann Bradley; Rebecca West; Paulette West; Michaelle Ogle b/n/f; Lind Sue Ogle; Eldon Kerr; Stella Karris; Sadie I. Owens; Margaret Betty; Charles Baldwin; Carrie Clemons,

(Plaintiffs-appellants in the Court of Appeals, Respondents in this Court).

Lamar Alexander; Eugene Fowinkle; Ben Crim; Carolyn Hale,

(Defendants-appellees in the Court of Appeals, Petitioners in this Court).

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BRIEF OF THE PETITIONERS, LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 715 F.2d 1036 (6th Cir. 1983) (dissenting opinion), and is set out in the Appendix to Petitioners' Petition for Writ of Certiorari at A. 1. The decision of the District Court is reported at 518 F.Supp. 877 (D.C. Tenn. 1981) and is set out in the Appendix to Petitioners' Petition for Writ of Certiorari at A. 27.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1983. The Petitioners, Lamar Alexander, Governor of the State of Tennessee, *et al.*, timely filed a Petition for Writ of Certiorari on October 31, 1983 and it was granted on February 21, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 504, Title V, "Rehabilitation Act of 1973", 87 Stat. 394, as amended, 29 U.S.C. § 794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

STATEMENT OF THE CASE

This case involves the legality of a decision by the Tennessee Medicaid Program to reduce the number of inpatient hospital days the program provides in a fiscal year to each eligible recipient from 20 to 14. At issue is whether or not this reduction

violates § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (hereinafter § 504) and regulations promulgated thereunder. The reduction was scheduled to go into effect on August 15, 1980, along with other program reductions to ensure the continued existence of the financially-strapped Medicaid Program. The respondents, plaintiffs below, all Tennessee Medicaid recipients, filed suit on August 14, 1980 to enjoin these proposed changes. Named as defendants, petitioners in this Court, were the Governor of Tennessee and 3 other State officials responsible for administration of the Medicaid Program.

The District Court ruled that the challenged reduction did not violate § 504. The Court of Appeals reversed, holding that the reduction, though neutral on its face, had a discriminatory "effect" or "disparate impact" upon the handicapped, thus creating a prima facie violation of § 504. The Court of Appeals, therefore, remanded the case to the District Court for further proceedings to determine if the "disparate impact" could be justified.

The Tennessee Medicaid Program

The "Tennessee Medical Assistance Act of 1968", T.C.A. § 14-23-101 *et seq.*, (hereinafter Tennessee Medicaid Program) established a comprehensive scheme to provide health care services to indigent Tennessee citizens funded jointly by the State of Tennessee and the federal government under Title XIX of the Social Security Act of 1965, 79 Stat. 343, 42 U.S.C. § 1396 *et seq.*[1] During the fiscal year preceding the filing of this lawsuit, Fiscal Year (FY) 1979-80, there were 341,960 individuals enroll-

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[1] Receipt of funds under Title XIX obligates the State of Tennessee to operate its Medicaid Program in accordance with a "state plan" approved by the Secretary of Health and Human Services. 42 U.S.C. §§ 1396 and 1396a; 42 C.F.R. Part 430; Harris v. McRae, 448 U.S. 297, *reh. den.* 448 U.S. 917 (1980).

ed under various eligibility categories in the Tennessee Medicaid Program.[2] (A. 184). Medical care services available to eligible recipients covered a wide spectrum including physician services, inpatient hospital services, prescription drugs, nursing home care, laboratory services and numerous outpatient clinical services.[3] (A. 185). Although federal law and regulations under Title XIX set requirements as to *whom* and *what* type of services must be provided[4], the *level* at which a particular service is provided is left to the state as long as the service is provided in a

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[2] Federal law requires state Medicaid programs to provide benefits to individuals receiving cash assistance under certain federally-funded welfare programs. 42 U.S.C. § 1396a(a)(10)(A)(i) and 42 C.F.R. § 435.100. This includes Aid to Families with Dependent Children (AFDC), 42 C.F.R. § 435.110, and Supplemental Security Income (SSI), 42 C.F.R. § 435.120. In addition, a State *may elect* to cover "medically needy" individuals who do not get categorical assistance but are unable to pay for their own medical care. 42 U.S.C. § 1396a(a)(10)(A)(ii) and 42 C.F.R. § 435.300. When this lawsuit was filed, the Tennessee Medicaid Program covered both the "categorically needy" and the optional "medically needy" category. *See* "Defendants List of Exhibits", D-1.

[3] Federal law requires each state Medicaid program to provide six specific medical care services to the categorically needy, *inpatient hospital services*, outpatient hospital services, laboratory and X-ray services, skilled nursing facilities, physican services and certain midwife services. 42 U.S.C. § 1396a(a)(10)(A); 42 U.S.C. § 1396d(a) 42 C.F.R. § 440.210. In addition to these required services, federal law and regulations, 42 U.S.C. § 1396d(a) and 42 C.F.R. § 440.1, authorize states to provide other "optional services". The Tennessee Medicaid Program at all times relevant to this suit provided both required and optional services. States may elect to provide less extensive services to "medically needy" eligibles. 42 U.S.C. § 1396a(a)(10)(C) and 42 C.F.R. § 440.220. Tennessee, however, provided equal services to both categories. T.C.A. § 14-23-107.

[4] *See* footnotes 2 and 3.

reasonable "amount, scope, and duration".[5] Even with limitations, the cost of operating the Tennessee Medicaid Program is significant. In FY 1979-80, for example, the Tennessee Medicaid Program purchased health care services for eligible recipients costing a total of $365,120,000, roughly 70% of which, or $253,515,000.00, was federal funds.[6] (A. 184).

Despite the expenditure of such large sums, the Tennessee Medicaid Program faced a fiscal crisis going into FY 1980-81. For that year, the Tennessee General Assembly appropriated in combined federal and state funds $388,000,000.00. This represented an increase of almost $26,000,000.00 over funds appropriated for the previous FY 1979-80. (A. 44). Nevertheless, Medicaid Program officials predicted that in order to provide medical services in FY 1980-81 at the same levels to the same number of individuals as in FY 1979-80 the Program needed $430,000,000.00 as opposed to the $388,000,000.00 appropriated. (A. 44). Since Tennessee law prohibited deficit

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[5] 42 C.F.R. § 440.230. At the time this action was filed in the District Court, § 440.230 provided as follows:

> (a) The plan must specify the amount and duration of each service that it provides.
>
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
>
> (c) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of diagnosis, type of illness or condition.
>
> (d) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

43 Fed. Reg. 45224, September 29, 1978.

[6] The share paid by the federal government varies from state to state in accordance with a statutorily defined formula. 42 U.S.C. § 1396b(a).

spending', Medicaid Program officials were faced with the real prospect of running out of money in March or April of 1980 and shutting the Program down altogether. (Transcript of Proceedings, August 15, 1980 p. 96).

The financial calamity facing the Tennessee Medicaid Program was not spawned by mismanagement, ballooning eligibility roles or an increase in the types of services. Rather, it was caused by the astronomical rise in health care costs which the Tennessee General Assembly refused to subsidize. From FY 1975-76 through FY 1980-81, the number of individuals enrolled in the Tennessee Medicaid Program remained relatively constant. (A. 64, 167). Likewise, the number of eligible individuals who used Medicaid services, ("users" or "recipients"), remained constant. (A. 64, 167).[8] By stark contrast, the cost of providing

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[7] Art. 2, § 24 of the Tennessee Constitution provides:

> No public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenues and reserves, including the proceeds of any debt obligation, for that year. No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized.

T.C.A. § 14-23-109 of the Medicaid law, likewise provides:

> In no event shall the services paid for by the state including assistance from the United States government require expenditures of state funds in excess of the amount appropriated for such purpose. The commissioner may by rule and regulation fix the maximum level of services as are deemed necessary to insure that an expenditure of state funds shall not exceed the amount provided for those purposes, as approved by the commissioner of finance and administration.

[8] The distinction between "eligibles" and "recipients" or "users" must be kept in mind. The former group consists of all individuals who have been deemed eligible for services either as categorically needy or as medically needy. (*See* footnote no. 2). "Recipients" or "Users" are those eligibles who have a need for medical services and actually "pull their card out of their pocket" to pay for the service. (A. 63).

services to this static pool of individuals during the same period of time skyrocketed at an annual rate of 20% from $136,000,000.00 in FY 1975-76 to $430,000,000.00 in FY 1980-81. (A. 65, A. 167).

Thus going into the FY 1980-81, the Tennessee Medicaid Program was faced with the choice of either cutting the cost of the Program by $42,000,000.00 or running out of money. Instead of taking drastic steps such as dropping individuals not required by law to be covered or cutting optional services[9], Medicaid Program officials chose to make adjustments in the level of benefits in several program services and institute other cost-saving measures. One of these changes involved a reduction in the number of inpatient hospital days Medicaid would pay hospitals on behalf of a recipient from 20 per fiscal year to 14 per fiscal year.[10] It was anticipated that this change alone would save the Program almost $13,000,000.00. (A. 68). All of the changes were scheduled for implementation at midnight on August 15, 1980.[11] (Transcript of Proceedings August 15, 1980 p. 65). The respondents filed suit on August 14, 1980. (A. 1).

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[9] *See* footnotes 2 and 3.

[10] Since its inception in 1969, the Tennessee Medicaid Program had provided 20 days of inpatient hospital care per fiscal year. Why the limit of 20 days was established is not clear. Federal law and regulations do not require State programs to provide any specific number of days as long as the limit is reasonable in "amount, duration, and scope". (*See* footnote 5). The number of inpatient hospital days covered will vary from state to state depending on several factors, including what other services are provided by a Program. Some states provided more inpatient days than Tennessee and others less. (A. 66-67).

[11] The other proposed reductions included: deletion of certain drugs from the list of prescription drugs paid for by Medicaid; limitation of the number of "outpatient" hospital visits allowable per year to each Medicaid recipient; reduction in the rate of reimbursement to physicians; limitation on the number of nursing home beds certified to care for Medicaid recipients. (Transcript of Proceedings, August 15, 1980 pp. 65-90). In addition, several changes were made in the manner in which hospitals were *reimbursed* for inpatient care. (A. 69-70).

Proceedings in the District Court

Respondents' Original and Amended Complaints, seeking declaratory and injunctive relief and filed August 14, 1980 and August 15, 1980 respectively, challenged the validity of virtually all the proposed cost-saving program changes on numerous procedural and substantive grounds. (A. 4). By the time of trial disputes with respect to all but two of the changes had been resolved, the change in covered inpatient hospital days and the pharmacy changes. The pharmacy issue was settled subsequent to trial, but prior to to the District Court's final decision of June 17, 1981. (A. 2). With respect to the change in the number of inpatient hospital days allowed each eligible recipient in a fiscal year, from 20 to 14, the respondents at trial attacked it on four grounds, one of which was that it discriminated against the handicapped in violation of § 504.

Impact on the Handicapped

Based upon evidence presented at trial, (A. 170, 172, and 184), the District Court properly found that during the preceeding fiscal year of 1979-80, there were 341,960 persons eligible to receive Medicaid services in Tennessee. Of this number, 90,668 were classified as handicapped and 16, 852 of them used one or more hospital days. Of the remaining 251,292 nonhandicapped recipients, 34,288 were in the hospital for one or more days during the study year. *Jennings v. Alexander*, 518 F.Supp. 877, 880 (D.C. Tenn. 1981); (Appendix to Petitioners' Petition for Certiorari, A. 31-32).

In order to establish the impact of a 14-day limitation on the handicapped, several studies were prepared by the Medicaid Program to determine the effect of the limitation had it been in place during FY 1979-80. (A. 168, 179).[12] Two tables in one

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[12] Both studies were based on an analysis of all claims for inpatient hospital services paid by the Tennessee Medicaid Program during the FY 1979-80. "Defendants' List of Exhibits", D-4(j) through D-4(s). One study was prepared by the EDS-Federal Corporation, a private

study, "Table 1", (A. 170), and "Table 3", (A. 172), formed the primary basis of the Court's findings. "Table 1" deals with *all* users of inpatient hospital services during FY 1979-80. It breaks down the number of users by the level of days used *i.e.*, how many users used 3 days, 4 days, 10 days, etc.[13] It also shows the *number* of users who would not have had all their inpatient hospital days paid for by Medicaid and the *percentage* of users who would have had all their inpatient needs covered if the limit had been 19, 18, 17, 16, 15, and 14 days.[14] "Table 3" provides the same data, though in a different format, as to the *handicapped* users of inpatient hospital services in FY 1979-80[15].

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firm on contract with the State of Tennessee to process Medicaid claims. (A. 168, A. 71). The second study was prepared by Dr. W. K. Vaughn, Director of the Division of Bio-Statistics at Vanderbilt University School of Medicine in Nashville, Tennessee. (A. 179, A. 90).

[13] The unusually large number of users ranked at the 20-day level is due to the fact that hospitals billed the program for no more than 20 days, it being the cap on reimbursement. Therefore, grouped at 20 days are users of 21 days and beyond. (A. 74).

[14] For example, under the "Cumul. Users Affected" column, it reveals that 7,279 users of inpatient hospital services used more than 14 days. This figure is calculated by *adding* the number of users at the 20, 19, 18, 17, 16, and 15 day levels. (A. 75). Under the "Percentage Users Served" column, it reveals that had the 14-day limit been in place in the study year, 92.56% of *all* users of inpatient hospital services would have had all their needs met by Medicaid. (A. 77). The formula used to arrive at this percentage is set forth on the table.

[15] Thus, according to "Table 3", the 14-day limit still would have met all the needed care of 84.4% of the handicapped users. This would leave only 4,617 users not having all their needs met. (A. 78).

Based on this data, the District Court properly concluded:

> [The evidence]. . .showed that for the fiscal year examined, 72.6% of the handicapped users would have been fully served by 14 days of hospital inpatient coverage. Stated otherwise, 27.4% of all handicapped users in 1979-80 needed more than 14 days of inpatient hospital treatment. By contrast, 92.2% of all nonhandicapped users were fully served at 14 days or less, leaving only 7.8% in need of inpatient hospital care beyond the 14th day. *Id.* at 881. (Appendix to Petitioners' Petition for Certiorari, A. 32)[16]

Based on its own calculations, the Court also found as follows:

> Indeed, the actual impact of the proposed limitation, even in the study year, should be kept in perspective. Since only 18.586% of handicapped eligibles used any inpatient hospital services, and 27.4% of those needed more than 14 days, only about 5% of the handicapped eligibles were in need of more than 14 days of hospital treatment. Thus, 95% would have been fully served at 14 days. *Id.* at 882, n. 6; (Appendix to Petitioners' Petition for Certiorari, A. 32).

The District Court, therefore, properly concluded that the proposed reduction in the number of inpatient hospital days did not violate § 504. While agreeing that a "disparate impact" test

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[16] The statistical findings of the District Court vary somewhat from the calculations on the face of "Table 1" and "Table 3" for two (2) reasons. First, in using the formula to calculate the percentage of users served, the District Court subtracted from the "total users" figure on each table the "Medicare/Medicaid" users. For these individuals, all the Tennessee Medicaid Program does is pay their "Medicare" deductible for hospital care. Neither the 20 nor 14 day limitation would effect the number of days paid under "Medicare". Second, the District Court converted the figures on "Table 1" reflecting "all" users into a "nonhandicapped" users table. Essentially figures on "Table 3" reflecting the number of handicapped users were subtracted from the figures on Table 1. These calculations are set out in the record. (A. 81-88).

was appropriate, the Court found that the alleged adverse effect of the reduction on the handicapped simply did not rise to the level of a "disparate impact". *Id.* at 885; (Appendix to Petitioners' Petition for Certiorari, A 40). In so ruling, the Court held that § 504 was never intended to ensure equality of results but only equal access by the handicapped to programs such as Medicaid. *Id.;* (Appendix to Petitioners' Petition for Certiorari, A 42-43). The Court carefully distinguished the present case from those cases where the alleged "disparate impact" amounted to an outright exclusion of the handicapped from the service or benefit in question. *Id.* at 883-884; (Appendix to Petitioners' Petition for Certiorari, A 36-40).

Proceedings in the Court of Appeals

On appeal, a three-judge panel of the Sixth Circuit Court of Appeals, Judge Merritt dissenting, reversed the District Court ruling and remanded the case for further proceedings. *Jennings v. Alexander,* 715 F.2d 1036 (6th Cir. 1983); (Appendix to Petitioners' Petition for Certiorari, A. 1). The Court of Appeals ruled that a "disparate impact" test was appropriate for determining a violation of § 504.[11] The Court of Appeals, however, contrary to the District Court, found that the 20 to 14-day reduction, based on the data in the record, constituted a discriminatory "effect" upon the handicapped. The Court of Appeals found such "effect" solely on the fact that 92.2% of all nonhandicapped who needed hospital care would have all their needs met at a 14-day limit as opposed to 72.6% for the handicapped. Accordingly, the Court of Appeals reversed the

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[11] In general, this test allows a plaintiff to establish a "prima facie" violation of § 504 if he can show that an activity, though unintentional and facially neutral, has a discriminatory "effect" upon the handicapped as opposed to the nonhandicapped. If a discriminatory "effect" is made out, then the burden shifts to the defendant to justify the disparity of treatment as necessary to achieve a legitimate goal of the activity under scrunity. *See Bryan v. Koch,* 627 F.2d 612 (2nd Cir. 1980).

District Court and remanded the case for further proceedings to determine if the defendant Medicaid officials could rebut the prima facie violation of § 504.

Judge Merritt, in a vigorous dissenting opinion, found no discrimination in the fact that "some" handicapped will be more adversely effected than the nonhandicapped. *Id.* at 1047; (Appendix to Petitioners' Petition for Certiorari, A 21). He saw the majority opinion as having turned the "effects" test under § 504 into a results test requiring federally-funded programs and services to be equally efficacious in their results to the handicapped and nonhandicapped alike. *Id;* (Appendix to Petitioners' Petition for Certiorari, A 22). Judge Merritt was also of the opinion that an "effects" standard should not have been applied in this case. *Id.*, at 1049; (Appendix to petition for Certiorari, A. 25).

SUMMARY OF ARGUMENT

Congress only intended to prohibit *intentional* discrimination when it enacted § 504, prohibiting discrimination of the handicapped in federally funded programs. This intent is most clearly demonstrated in the language of § 504 which is almost identical to Title VI of the Civil Rights Act of 1964 which prohibits discrimination of minorities in federally funded programs. *Consolidated Rail Corporation v. Darrone,* No. 82-862, February 28, 1984. With respect to Title VI, this Court has conclusively held that it bars only intentional discrimination. *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). *Guardians Association v. Civil Service Commission of the City of New York,* No. 81-431, July 1, 1983. If Congress intended to prohibit unintentional discriminatory *effects* under § 504, it would have made its intent clear in the language or history of § 504 as in other laws prohibiting discrimination. *See, e.g., Griggs v. Duke Power Company,* 401 U.S. 424, 432 (1971). *Board of Education, New York City v. Harris,* 444 U.S. 130, 140 (1979).

A ruling that § 504 prohibits only intentional discrimination is consistent with the narrow purpose of § 504 which is to ensure the even-handed treatment of the handicapped in federally funded programs and not affirmative action to overcome disabilities caused by handicaps. *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979). A contrary ruling would attribute to Congress the unlikely intent to afford greater protection to the handicapped under § 504 than minorities protected under Title VI.

Since § 504 prohibits only intentional discrimination, implementing regulations thereunder can only prohibit intentional discrimination. *Guardians Association v. Civil Service Commission of New York,* No. 81-431, July 1, 1983, (opinion of O'CONNOR, J); *Bratterton v. Francis,* 432 U.S. 416, 426 (1977); *Mourning v. Family Publication Services, Inc.,* 411 U.S. 356, 369 (1973). Petitioners recognize, however, that in *Guardians Association v. Civil Service Commission of New York, supra,* (STEVENS, BRENNAN and BLACKMUN), three justices upheld regulations under Title VI prohibiting discriminatory "effects" despite their finding that Title VI prohibited only intentional discrimination. They did so upon a belief that the regulations "furthered" the purpose of Title VI. An effects standard under § 504, however, is a false indicator of handicapped discrimination. This is due to the diverse nature of the class of individuals constituting the handicapped and their reliance on a wide variety of programs. Any changes in such programs will almost always adversely impact on some group of handicapped more than the nonhandicapped. As such, regulations incorporating an "effects" standard do not further the purpose of § 504.

Even if § 504 or implementing reguiations prohibit unintentional discriminatory effects, the Court of Appeals erred in finding a prima facie violation of § 504 in this case. There is simply no proof that a reduction in the number of inpatient hospital

days provided each Tennessee Medicaid recipient per year would have a disparate impact on the handicapped. Both the handicapped and nonhandicapped would have 14 days of care available to them. At this level, 95% of the *eligible* handicapped would have all their inpatient hospital needs met. *Jennings v. Alexander*, 518 F.Supp. at 882 n. 6.

The Court of Appeals mistakenly found a disparate impact or prima facie violation of § 504 in the fact that fewer handicapped users of inpatient hospital services would have all their needs met at 14 days than the nonhandicapped users of the service. Under the Court of Appeals' interpretation, § 504 must not only guarantee equal access of the handicapped to federally funded programs, but must also guarantee equality of results. Regulations implementing § 504 preclude such an interpretation. 45 C.F.R. § 84.52(a)(3) and 45 C.F.R. § 84.4(b)(2). Furthermore, requiring federally funded programs to meet all the needs of the handicapped would "obliterate" the ability of the states to set reasonable limits on program services otherwise authorized by law. *Doe v. Colautti*, 592 F.2d 704, 710 (3rd Cir. 1979).

ARGUMENT

I. A Violation Of § 504 Or Regulations Promulgated Thereunder Requires Proof Of "Intentional" Discrimination.

A. Congress Only Intended To Prohibit Intentional Discrimination Under § 504.

Section 504 provides, in pertinent part, as follows:

> No *otherwise qualified* handicapped individual in the United States, as defined in section 706(7) of this title, shall, *solely by reason of his handicap*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .[18] (Emphasis supplied).

A unanimous Court in *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) held that the purpose of § 504 was simply to ensure the even-handed treatment of qualified handicapped persons in federally funded programs and *not* affirmative action to overcome the disabilities caused by handicaps.[19] The carefully drawn language of § 504 and its narrow

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[18] Section 504, Title V, "Rehabilitation Act of 1973", 87 Stat. 394, as amended by Section 119, Title IV, "Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978", 92 Stat. 2982, 29 U.S.C. § 794. The "Rehabilitation Act of 1973" and its 1978 amendments represent a comprehensive effort on the part of Congress to coordinate and enhance the efforts of the federal government to assist and rehabilitate the handicapped. Section 504 is a very small part of this multifaceted law. The extremely sparse legislative history dealing specifically with § 504 and its subsequent amendment in 1978, is silent as to the nature of the discrimination prohibited thereunder. *See e.g.*, S. Rep. 93-318, 93rd Cong., *reprinted in* U.S. Code Cong. & Admn. News, 1973 p. 2076; H. R. Rep. 95-1149, 95th Cong., *reprinted in* U.S. Code Cong. & Admn. News, 1978 p. 7312.

[19] In *Davis*, the Court ruled, *inter alia*, that Southeastern Community College in North Carolina did not have an affirmative duty either under § 504 or implementing regulations to lower its admission standards and modify its existing instructional plan to accommodate the special needs of a deaf applicant.

purpose is consistent with Congress' intent to limit violations of § 504 to intentional discrimination.

This intent is most clearly demonstrated in the similarity of § 504 to language found by this Court to prohibit only intentional discrimination. The operative language of § 504 prohibiting discrimination of the handicapped in federally-funded programs is virtually identical to that found in Title VI of the "Civil Rights Act of 1964" prohibiting discrimination of minorities in federally-funded programs.[20] *Consolidated Rail Corporation v. Darrone,* No. 82-862, February 28, 1984. With respect to Title VI, *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) and *Gaurdians Association v. Civil Services Commission of the City of New Yor .,* No. 81-431, July 1, 1983, leave no doubt that when Congress enacted Title VI in 1964, its intent *at that time* was to prohibit only discrimination prohibited under the Fifth and Fourteenth Amendments to the United States Constitution. Since *Washington v. Davis,* 426 U.S. 229 (1976) had previously established that the Fifth and Fourteenth Amendments prohibited only intentional discrimination, the effect of *Bakke* was to limit discrimination prohibited under Title VI to intentional discrimination. One reason given for adopting a "constitutional" standard is that Congress intended the meaning of Title VI to "evolve" with the interpretation of the commands of the Constitution. 438 U.S. at 340. (BRENNAN, WHITE, MARSHALL, and BLACKMUN). Therefore, when Congress enacted § 504 in 1973 in the mirror image of Title VI, without qualification, it locked the nature of the discrimination prohibited by § 504 into the same evolving constitutional standards. Accordingly, intentional discrimination must be shown to prove a violation of § 504.

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[20] Section 601 of Title VI of the "Civil Rights Act of 1964", 78 Stat. 252, 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In sharp contrast to the language and history of § 504 and Title VI are similar statutory schemes where Congress expressed its intent to prohibit the unintentional effects of discrimination. Section 703 of Title VII of the "Civil Rights Act of 1964", for example, makes it unlawful for an employer to treat his employees:

> . . . in any way which would deprive or *tend to deprive* any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. 78 Stat. 255, 42 U.S.C. § 2000e-2. (Emphasis supplied).

In *Griggs v. Duke Power Company,* 401 U.S. 424, 432 (1971), Title VII was interpreted as expressing Congress' intent to eradicate the "*consequences*" of discriminatory employment practices without regard as to whether or not they were intentional. Likewise, in *Board of Education, New York City v. Harris,* 444 U.S. 130, 141 (1979), the Court had little trouble in finding that Congress intended to prohibit unintentional discrimination in the assignment of public school teachers under § 706(d)(1)(B) of the 1972 Emergency School Aid Act, 86 Stat. 358, 20 U.S.C. § 1605(d)(1)(B). Though the language of the Act was somewhat ambiguous, the Court concluded:

> The overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text of § 706(d)(1)(B) *all* point in the direction of an impacts test. *Id.* (Emphasis supplied).

If Congress had intended to prohibit anything other than intentional discrimination under § 504 it would have expressed such an intent as it has done in these instances.

Finally, a holding that § 504 can be violated upon proof of unintentional discriminatory effects, while Title VI imposes a stricter burden of discriminatory "intent", would attribute to Congress a desire to afford greater protection to the handicap-

ped than minorities protected by Title VI. There is no evidence of such a legislative purpose nor would it seem likely absent some clear expression to the contrary.[21]

B. Since § 504 Prohibits Only Intentional Discrimination, Regulations Promulgated Thereunder Can Only Prohibit Intentional Discrimination.

A holding that § 504 prohibits only intentional discrimination should preclude any futher discussion as to a less vigorous effects standard being applied under implementing regulations. It is generally recognized that administrative regulations cannot go beyond the statute they interpret or implement. *Guardians Association v. Civil Service Commission of New York,* No. 81-431, July 1, 1983 (opinion of O'CONNOR, J.); *Bratterton v. Francis,* 432 U.S. 416, 426 (1977); *Mourning v. Family Publication Services, Inc.,* 411 U.S. 356, 369 (1973).

Petitioners recognize, however, that three members of the Court in *Guardians Association v. Civil Service Commission of New York, supra,* (STEVENS, BRENNAN and BLACKMUN), while holding that a violation of Title VI required a showing of discriminatory "intent", nevertheless held that implementing regulations promulgated thereunder could prohibit unintentional discriminatory "effects". This holding was based on the belief that effects regulations "furthered" the ultimate purpose of Title VI. Given the similarity of Title VI and § 504 and their implementing regulations, one might be tempted to conclude that regulations implementing § 504 could also impose an effects standard. The petitioners submit that a similar holding in this case would be inappropriate.

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[21] From a constitutional perspective, the class of individuals covered by Title VI are suspect classifications, and afforded a much greater degree of protection than non-suspect classifications such as the handicapped. *Compare, Loving v. Virginia,* 388 U.S. 1 (1967) with *California Association of Physically Handicapped v. F.C.C.,* 721 F.2d 667, 670 (9th Cir. 1983).

It is questionable whether any imlementing regulations under § 504 adopting an "effects" standard can be a true indicator of handicapped discrimination. This is so because the class of handicapped persons protected by § 504 is far from a homogeneous group. It is composed of individuals with a multitude of handicapping conditions of varying degree who rely on an equally diverse set of federally funded social services. A reduction or limitation in any one of these services will undoubtedly have an adverse impact on *some* goup of handicapped individuals to a greater degree than the nonhandicapped or some other group of handicapped. An "effects" analysis in these circumstances will almost always produce a finding of some form of disparate impact. Yet it would be erroneous to conclude, as did the Sixth Circuit in this case, that these situations constitute a prima facie violation of § 504.

Judge Merritt in his dissenting opinion stated the problem in these terms:

> It is highly questionable whether a disparate impact test should be applied under § 504. This case appears to be the first federal appellate court opinion which actually finds discrimination against the handicapped by applying a 'disparate impact' test.
>
> . . .
>
> Assuming *arguendo* the applicability of a disparate impact test, this case illustrates why such a test will not work unless a *bright-line equality of access standard is used. Combining an equality of results standard with a disparate impact test means the plaintiff always wins.*
>
> According to the majority's interpretation of the statute. . . there are many sub-classes of patients who fall within the 'handicapped' category, not just traditional groups like the blind, the deaf and the lame.
>
> . . .

> Any reduction in funding or services will have a differential impact on some class of patients. In such a situation the disparate impact test will always work for some class of illness; it will always produce a finding of discrimination.

Jennings v. Alexander, 715 F.2d at 1049; (Appendix to Petitioners' Petition for Certiorari, A. 25).

Congress was obviously aware of the difficulties in isolating discriminatory activities when it prohibited discrimination of the handicapped under § 504 "solely by reason of. . . handicap". Likewise, when the then-Secretary of Health, Education, and Welfare first promulgated § 504 regulations, he expressed the difficulty in dealing with handicapped discrimination in federally funded programs:

> From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of non-discriminatory treatment a difficult one.

42 Fed. Reg. 22676, May 4, 1977. Indeed, the Department did not initiate procedures to enact regulations for almost three years after passage of § 504, relying soley on the general prohibition of the statute. *Cherry v. Mathews,* 419 F.Supp. 922 (D.D.C. 1976).

II. Even If A "Disparate Impact" Or "Effects" Standard Is Appropriate To Determine A Violation Of §504, There Is No Proof In This Case Of A Disparate Impact On The Handicapped.

Alternatively, the petitioners argue that even if actions which unintentionally discriminate against the handicapped can constitute violations of § 504, it does not relieve the complaining party of its burden of proving discrimination. Accordingly, to

establish a prima facie violation of § 504, even under a "disparate impacts" test, it requires proof that the handicapped have been excluded or otherwise denied access to a service or benefit afforded the nonhandicapped.[22] There is no such proof in this case. Both handicapped and nonhandicapped Tennessee Medicaid recipients would have access to 14 inpatient hospital days per year. As correctly calculated by the District Court, 95% of all "eligible" handicapped Medicaid recipients would have all of their inpatient hospital needs met at the 14-day limitation. *Jennings v. Alexander,* 518 F.Supp. at 882, n. 6; (Appendix to Petition for Certiorari, A. 34). There is no other evidence in this case to demonstrate that the 14-day limitation would render inpatient hospital services for the handicapped ineffective, inaccessable, or otherwise a constructive nullity.

The only disparity between the handicapped and nonhandicapped revealed in this record is that the 14-day limitation would satisfy all inpatient hospital needs of a smaller percentage of handicapped recipients than nonhandicapped recipients. The fact that some handicapped recipients may require more inpatient hospital services by virtue of their handicaps when compared to the nonhandicapped, is an imbalance which the Tennessee Medicaid Program does not have to accommodate under § 504. Any thought to the contrary was laid to rest by this Court's holding in *Southeastern Community College v. Davis, supra,* at 410-411. Likewise, § 504 implementing regulations governing the Tennessee Medicaid Program dispell any such notion.

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[22] The decisions of this Court are in accord: *Guardians Association v. Civil Service Commission of the City of New York, supra* (unintentional exclusion of minorities from municiple employment); *Board of Education v. Harris, supra,* (unintentional exclusion of minority public school teachers from certain teaching assignments); *Lau v. Nichols,* 414 U.S. 563 (1974) (unintentional exclusion of minority students from meaningful access to public education); and *Griggs v. Duke Power Company, supra* (unintentional exclusion of minorities from certain job classifications).

45 C.F.R. § 84.52(a)(3) of the regulation of the Department of Health and Human Services[23] implementing § 504 and applicable to the Tennessee Medicaid Program provides:

> (a) . . . In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:
>
> . . .

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[23] 42 Fed. Reg. 22677, May 4, 1977; 45 C.F.R. Part 84 . The regulations address handicapped discrimination in both general terms and in the context of specific types of programs and services. Section 84.52(a) of Subpart F, dealing with "Health, Welfare, and Social Services", provides in full:

> (a) General. In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:
>
> (1) Deny a qualified handicapped person these benefits or services;
>
> (2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;
>
> (3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;
>
> (4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or
>
> (5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Other than subsection (a)(3), the prohibitions of this section are not at issue in this case. They all deal with questions of "access" by the handicapped to aids, benefits or services. There is no argument in this case that the handicapped have been denied access to inpatient hospital services.

> (3) Provide a qualified handicapped person with benefits or services that are not as effective (*as defined in* § 84.4(b)) as the benefits or services provided to others; (Emphasis supplied).

This prohibition is dramatically qualified by 45 C.F.R. § 84.4(b)(2) which provides:

> For purposes of this part, *aids, benfits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result,* to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs. (Emphasis supplied).

These regulations, properly construed, require only that aids, benefits and services, be provided in like kind to both the handicapped and nonhandicapped. Applied to the number of inpatient hospital days provided by the Tennessee Medicaid Program, the regulations only require that the same amount be extended to the handicapped as to the nonhandicapped. In order to violate these regulations one must intentionally designate a lesser amount to be provided the handicapped than the nonhandicapped.

By going beyond the actual requirements of § 504, the Court of Appeals has established an unprecedented "effects" standard for determining discrimination of the handicapped.[24] No

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[24] It could be argued that this standard applies in Title VI cases as well. In its opinion, the Court of Appeals viewed tests for determining a violation of § 504 and Title VI to be identical:

> Section 504 is "part of the general corpus of discrimination law". *New York State Association for Retarded Children v. Carey,* 612 F.2d 644 (2d Cir. 1979). It is predicated on Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, and is intended to prohibit the expenditure of public funds in programs that

longer must an actual discriminatory impact be shown to support a prima facie violation of § 504, but merely that a program *in some manner* is less efficacious to the handicapped than the nonhandicapped. To avoid a prima facie violation of § 504 under this standard. a program will have to ensure equal efficacy. Where the handicapped are proportionally greater users of a program service, equal efficacy will only be obtained at limits which will satisfy all the needs of the handicapped. For example, under the Sixth Circuit rationale, there is nothing to prevent the District Court on a remand of this case from finding a prima facie violation of § 504 at the *20-day* inpatient hospital day limit. All the Court need find at the 20-day limit is a disparity similar to the one found at the 14-day limit. The Tennessee Medicaid Program would then have to justify why the limit should not be pushed upwards of 20 days.

Further, if § 504 requires federally funded services to be provided at levels to satisfy all the needs of the handicapped, it "obliterates" other reasonable and discretionary limits which may be placed on such programs. *Doe v. Colautti,* 592 F.2d 704, 710 (3rd Cir. 1979).[25] In this case, federal regulations governing the Tennessee Medicaid Program require only that inpatient

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discriminate against the handicapped. *See* Sen. Rep. 1297, *supra.* Courts have generally applied the same tests of discrimination law to Section 504 as are applied to Title VI.

Jennings v. Alexander, 715 F.2d at 1041.

[25] In *Colautti,* a Medicaid recipient in a private psychiatric hospital challenged Pennsylvania's 60-day per year limit under § 504. He argued that the limit discriminated against the mentally ill handicapped because no such limit was placed on "private general hospital" services. The Third Circuit affirmed the District Court's denial of a preliminary injunction for failure to demonstrate any likelihood of success on the merits. The Court ruled, *inter alia,* that the 60-day limit was in line with the Medicaid law and regulations and that to apply § 504 to defeat the Pennsylvania limitation would "obliterate" distinctions made by the Medicaid law in what a state was required and not required to provide recipients. *Id.* at 710.

hospital services be provided in an "amount, scope and duration to reasonably achieve its purpose". 42 C.F.R. § 440.230. (*See* n. 5). Section 504 must be read in *pari materia* with such regulations. When done so, it is again clear that § 504 does not require federally funded programs to meet all the demands of the handicapped but only to eliminate discrimination against the handicapped.

Finally, the majority opinion of the Sixth Circuit constitutes an unwarranted intrustion into the state's budgetary process by creating a whole new source of challenges to limitations placed by states on their federally funded social welfare programs. *Jennings v. Alexander,* 715 F.2d at 1047 (MERRIT dissenting). The relative ease with which a prima facie violation of § 504 can be found under the Sixth Circuit's standard almost guarantees the plaintiff a preliminary injunction and a trial on the merits at which the defendant will be required to justify its actions. This diverts § 504 from Congress' intended purpose of ensuring even-handed treatment of the handicapped into a ready tool for litigants eager to thwart reductions in federally funded social welfare programs.

CONCLUSION

For reasons set forth above, the Petitioners respectfully request that the decision of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of the Petitioners has been mailed this 17th day of May, 1984, to the below-referenced counsel.

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